United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN
Plaintiff-Appellee

VICTOR J. SANTIAGO-DIAZ, In his personal capacity and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, In Her personal capacity and as Human Resources Director of the Municipality of Toa Baja
Defendants – Appellants

Before
Torruella, Lynch, and Lipez. Circuit Judges.

ORDER OF COURT

Entered: March 28, 2006

In light of the Supreme Court's decision in this case, the court directs the parties to submit supplemental brief not exceeding 25 pages per party, allocated as the parties see fit, among the following three issues identified in the original appellate briefs: (1) the district court's evidentiary rulings; (2) the district court's order that the plaintiff be reinstated; and (3) the qualified immunity issue. The supplemental briefs should not repeat any information contained in the original briefs. The appellants' brief shall be filed no later than twenty days from the date of this order. The appellee shall file her brief no later than twenty days after the appellants have submitted their materials. All supplemental briefing must conform to Fed. R. App. P. 32.

OPPOSITION BRIEF

(1)

No. 06-702

FILED
DEC 20 2006
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

DIANA VAZQUEZ-VALENTIN,

Petitioner,

v.

VÍCTOR J. SANTIAGO-DIAZ, in his personal capacity and as mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, in her personal capacity and as Human Resources Director of the Municipality of Toa Baja,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

SUSANA I. PEÑAGARÍCANO-BROWN
Assistant Solicitor General
Counsel of Record

SALVADOR J. ANTONETTI-STUTTS
Solicitor General of Puerto Rico

Office of the Solicitor General
DEPARTMENT OF JUSTICE
COMMONWEALTH OF PUERTO RICO
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
Tel. (787) 724-2165
Fax (787) 724-3380
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTIONS PRESENTED

I. After this Court granted the petition in 04-1322, vacated the judgment of the United States Court of Appeals for the First Circuit, and remanded the matter to that court for further consideration in light of this Court's opinion in *Unitherm Food Systems, Inc. v. Swift-Eckridge Inc.*, 126 S.Ct. 980 (2006), did the Court of Appeals err in allowing the parties to file supplemental briefs on the other issues that had been presented by respondents-appellants in their original brief but not reached by the Court of Appeals in its first opinion and judgment?

II. Did the Court of Appeals below err in vacating the jury verdict and remanding for a new trial based on its finding that the District Court's exclusion of the documentary evidence was not harmless?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The petitioner accurately lists the parties to the proceedings. No disclosure need be provided under Rule 29.6 because Respondents Víctor J. Santiago-Díaz and Milagros Delgado-Ortiz are individual citizens and no non-governmental corporations or publicly held companies are a party to this action.

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BRIEF IN OPPOSITION

Respondents Víctor J. Santiago-Díaz ("Santiago"), as former Mayor of Toa Baja, Puerto Rico, and Milagros Delgado-Ortiz ("Delgado"), as Human Resources Director of the Municipality of Toa Baja, both in their individual capacities, hereby oppose the petition for writ of certiorari, which seeks review of the U.S. Court of Appeals' decision of August 22, 2006.

COUNTER-STATEMENT OF THE CASE

A. Introduction

Further review of the First Circuit's decision in this case is unwarranted. First, Petitioner has failed to set forth compelling reasons in order for this Court to exercise its judicial discretion and review on a writ of certiorari pursuant to Rule 10 of the Supreme Court of the United States. Second, this is the second time that Petitioner has brought before this Honorable Court the question of whether the appellate court erred in allowing the parties to supplement their original briefs: Petitioner filed a petition for writ of mandamus in Docket No. 05-1390, which was already denied by this Court.

Even though Respondents contend that Petitioner's claims are not worthy of this Court's review, given that pursuant to Rule 15(2) of this Honorable Court misstatements of fact or law must be addressed at this stage of the proceedings, Respondents have elected out of an extreme abundance of caution to briefly clarify the record and point out to the Court the deficiencies in Petitioner's statement of facts in order to avoid having any misstatement made in the petition deemed waived by the Court.

B. Background

During the trial of this political discrimination case, defendants moved twice for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), after plaintiff and defendants each finished submitting their respective cases. Both motions having been denied,[1] the case went to the jury, which returned a verdict for the plaintiff on May 14, 2002.[2] On the same day that the jury returned its verdict, the court issued an *Opinion and Order* denying defendants' motion for qualified immunity. (Individual capacity Appellants' Add. at 28-32; Docket No. 76).

As a result, Defendants filed a Rule 59 motion requesting the court to set aside the compensatory and punitive damages awards.[3] In that motion, Defendants challenged the sufficiency of the evidence underlying the jury's verdict. Plaintiff then filed her opposition.[4] Roughly one year later, on May 5, 2003, the District Court issued an *Opinion and Order* denying Defendants' Rule 59 motion, as well as granting Plaintiff's motion for reinstatement.[5] (Individual capacity Appellants' Add. at 35-40; Docket No. 99). Final Judgment followed on that same

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[1] *See* Individual capacity Appellants' Add. at 23-27; Docket No. 68. The court granted in part Defendants' Rule 50 motion dismissing Plaintiff's due process claims under the Fifth and Fourteenth Amendments. *See* Individual capacity Appellants' Add. at 26.

[2] *See* Docket No. 75.

[3] *See* Docket No. 84.

[4] *See* Docket No. 85.

[5] Plaintiff had filed a Motion for Reinstatement to her position of Executive Director II (Docket Nos. 80 and 87), and Defendants timely opposed it (Docket Nos. 82 and 88).

date. (Individual capacity Appellants' Add. at 41-43; Docket No. 100).

In their Brief on appeal, Defendants-Appellants raised the following arguments: *first*, that Plaintiff's evidence of political discrimination was insufficient to establish a *prima facie* case of political discrimination; *second*, that the district court erred by excluding certain documentary evidence that was crucial to Defendants' defense incurring in reversible error; *third*, that the presiding judge's prejudicial remarks and conduct before the jury tainted the verdict to the point of warranting a new trial; *fourth*, that the District Court abused its discretion by ordering the reinstatement of Plaintiff and; *fifth*, that the District Court erred in denying the Defendants' qualified immunity defense. *See Vázquez-Valentín v. Santiago-Díaz*, 385 F.3d 23, 29 (1st Cir. 2004). Plaintiff-Appellee contested Appellants' arguments on appeal.

On September 22, 2004, the United States Court of Appeals for the First Circuit vacated the judgment and ordered the entry of judgment for defendants, ruling that Plaintiff had failed "to adduce sufficient evidence for a jury to reasonably infer that Plaintiff's political affiliation was a substantial or motivating factor in an adverse employment action." *See Vázquez-Valentín*, 385 F.3d at 40.[6]

Plaintiff-Appellee then filed a Petition for Writ of *Certiorari* before this Court, No. 04-1322, in which she requested that the judgment below be reversed. Appellants filed the corresponding Brief in Opposition. No further briefs or motions were filed by either party.

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[6] Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc before the appellate court was denied.

On February 21, 2006, this Court gvr'd the case, granting the petition for writ of *certiorari*, vacating the appellate court's judgment, and remanding the case to the First Circuit for further consideration in light of its opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), which it had just issued. *See Diana Vázquez-Valentín v. Víctor J. Santiago-Díaz*, 126 S. Ct. 980 (2006); Petitioner's Appendix C at 28a.

On March 20, 2006, Defendants-Appellants (here Respondents) Santiago and Delgado filed in the appellate court a *Notice of Disposition Above and Request to File Supplemental Brief.* On March 28, 2006, the First Circuit entered an Order whereby it directed "the parties to submit supplemental brief, [. . .] allocated as the parties see fit, among the following three issues identified in the original brief." (Petitioner's Appendix D at 29a).

Soon thereafter, on April 28, 2006, Plaintiff-Petitioner filed a *Petition for Writ of Mandamus or Prohibition* with this Honorable Court. (Docket No. 05-1390). In addition, Plaintiff-Petitioner filed a *Motion to Stay Order of Panel of the United States Court of Appeals for the First Circuit.* Petitioner argued that the court of appeals, by ordering supplemental briefing on three errors presented by Appellants in their original brief, had not complied with this Honorable Court's Mandate of February 21, 2006. On October 2, 2006, this Court denied Plaintiff's petition. *In re Diana Vázquez-Valentín*, ___ S. Ct. ___, 2006 WL 1178747 (U.S.).

On May 8, 2006, Defendants-Appellants filed their Supplemental Brief on Remand.[7] On June 5, 2006, Plaintiff-Appellee filed her Supplemental Brief on Remand. On August 22, 2006, the Court of Appeals for the First Circuit entered its decision vacating the District Court's judgment and remanding for a new trial based on documentary evidence wrongly excluded and with specific instructions to the District Court that, based on those documents wrongly excluded, it reevaluated the qualified immunity defense. (Petitioner's App. A at 23a, 26a). The present petition for writ of *certiorari* filed by Plaintiff followed.

C. Deficiencies and Omissions in Petitioner's Statement of Facts and Law

In Petitioner's statement of the facts there is an omission that should be brought to this Court's attention. In addition, the facts relating to the First Circuit's decision regarding the District Court's evidentiary ruling are misconstrued. The following are Petitioner's deficiencies and omissions:

1. In the statement of the case, the Petitioner fails to fully disclose and clarify the bases for the Court of Appeals order directing the parties to supplement the briefs. Petitioner seems to infer that the appellate court, "on its own," ordered the parties to file supplemental briefs addressing three of the five errors argued by respondents.

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[7] In their supplemental brief, Appellants respectfully requested the appellate court to examine, as additional grounds for relief, the other issues/arguments that were duly raised and preserved for appeal by them, but which were not reached by the appellate court because of its previous disposition of the sufficiency of the evidence. (Santiago and Delgado's Supplemental Brief on Remand at 18-21).

(*See* Petition for Writ at 4, 6). However, although the appellate court has the authority to do so on its own, as previously discussed, Respondents had prompted the appellate court to allow them to supplement their original brief with regards to the *Unitherm* case. Thus, the appellate court partly responded to Appellants' request. Appellants not only discussed the *Unitherm* case and how it pertained to the present case, but also further developed their qualified immunity argument, as allowed by the appellate court.

2. As to the issue of the District Court's evidentiary ruling, contrary to Petitioner's representations to this Court (Petition for Writ at 14-17), the First Circuit ruled that the exclusion of the documentary evidence was a harmful error because the audit report applied to Vázquez's particular situation; the testimonial and documentary evidence presented at trial regarding Vázquez's qualifications for the position did not support the exclusion of the documentary evidence; and the parties had never made a stipulation with regards to the audit report or any other documentary evidence. In addition, Respondents never waived the issue of the evidentiary ruling; to the contrary, from the record it can be easily ascertained that various offers of proof were made in order to duly preserve this issue for appeal. (Municipality's Brief at 13-18).

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner's claims regarding the limited scope of the mandate on remand, as well as their flawed statements

regarding the evidentiary ruling, which excluded documents central to Defendants-Respondents defense, are unworthy of review by this Honorable Court.

I. This Honorable Court's Mandate On Remand Did Not Preclude The Appellate Court From Reviewing The Other Issues That Had Been Presented On Appeal.

Petitioner asserts that this Honorable Court's mandate precluded the appellate court from reviewing on remand the other issues raised in the appeal, but offers no case law in support of such contention. (Petition for Writ at 8-10). Based on the misleading premise that the mandate was specific and not general, Petitioner claims that the First Circuit could not deviate from the mandate and was limited to reviewing the case in light of the *Unitherm* case alone. (Petition for Writ at 8-11). Such a narrow reading of the mandate is unreasonable.[8]

This Court has previously established that "[t]he doctrine of law of the case comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). The only issue reached by

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[8] Petitioner also argued that the appellate court's order directing the parties to supplement their original briefs forced the parties to engage in repetitive litigation, wasting, thus, resource, time, and money, and causing delays, contrary to judicial policy. (Petition for Writ of Certiorari at 7; *see also* Petition for a Writ of Mandamus at 8, Docket No. 05-1390). Petitioner is not in a position to complain about unnecessary expenditures of time and effort, however, since she has not hesitated in bringing her case to this Court on three separate occasions. In any case, the First Circuit's briefing order was fully within the broad scope of its case-management discretion.

the First Circuit in its original judgment was the controversy regarding the sufficiency of the evidence. *Diana Vázquez*, 385 F.3d at 29. The Court expressly declined to address any of the other issues presented in the appeal. *Id.* This Court has also stated that "[o]n remand, the 'Circuit Court may consider and decide any matter left open by the mandate of this court.'" *Quern*, 440 U.S. at 347 n.18; *Nguyen v. United States*, 792 F.2d 1500, 1502 (1986) ("'While a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues.'") (*citing Quern*, 440 U.S. at 347 n.18; *Sprague v. Ticonic National Bank,* 307 U.S. 161, 168 (1939)).

Respondents respectfully contend that the Supreme Court's decision and/or mandate did not bar the court below from examining other issues presented, but not reached, in the case at bar. The evidentiary ruling and its disposition regarding the qualified immunity defense were within the appellate court's jurisdiction to review, particularly when those issues were duly presented to the appellate court and had not been previously considered by that court.[9] Furthermore, from a reading of the August 22, 2006 Judgment, it can be easily ascertained that the appellate court fully complied with the mandate of this Court. (Petitioner's App. A at 4a-6a).

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[9] In the first petition for writ of certiorari, No. 04-1322 (Op. Cert. at 13-14), Defendants-Respondents respectfully suggested that if this Court were to consider issuing the writ of certiorari, that the writ should not extend to the other arguments not related to the sufficiency of the evidence and raised on appeal by Appellants, given that these other issues had not been addressed by the Court of Appeals for the First Circuit because of the disposition of the sufficiency of the evidence argument.

Finally, Petitioner seems to have overlooked the fact that this Court already denied her petition for writ of mandamus touching upon this exact issue. This alone is sufficient to make the petition for writ of certiorari undeserving of review.

II. On Its Merits, The First Circuit's Decision Regarding The District Court's Evidentiary Ruling Was Correct.

The district judge excluded the Comptroller's Audit Report in its entirety (as well as all references to the document),[10] because the document constituted hearsay, and because admitting the report into evidence would be unduly prejudicial to the Plaintiff. (Petition for Writ at 14-15, 21). Plaintiff contends that the ruling, even if in error, was harmless because the report does not speak about her and that the instructions of the court, in lieu of admitting the Report, were enough. (Petition for Writ at 15, 17-18). This and Petitioner's other arguments are unconvincing. (Petition for Writ at 15-16, 18-20).

The rulings that excluded the Audit Report and other documentary evidence (such as the OCAM and OCALARH letters, among others), which were central to Respondents' defense, were not harmless errors. (Municipality's Brief at 7). *First*, Respondents never stipulated any jury instruction dealing with the exclusion of the Comptroller's Report and the other documentary evidence mentioned in Defendants-Appellants' principal brief. (Municipality's Brief at

[10] Defendants Delgado and Santiago were not allowed to testify or mention the audit report or the other excluded documentary evidence. (Municipality's Brief at 15-17).

13-18). The record does not contemplate such finding. The fact that the court made an evidentiary ruling (Municipality's Brief at 14, 16-18; *see also* Petition for Writ at 19a-21a), which Defendants-Respondents were obliged to obey until they had the opportunity to appeal the same, did not automatically convert the ruling in a stipulation.

Second, Defendants made all the pertinent offers of proof regarding all excluded documentary evidence precisely in order to preserve the issue of the evidentiary rulings for appeal. (Municipality's Brief at 13-18). Thus, there was no waiver by Defendants, contrary to what Petitioner now argues for the first time in the case; indeed, if there is waiver here, it is Petitioner's.[11]

Third, it is Respondents' position that the report and the letters do not fit the definition of hearsay. In the remote eventuality that the documents were to be deemed as hearsay, Respondents made sure to invoke one of the exceptions to the exclusionary rule – specifically, they expressly relied on Fed. R. Evid. 803(8). (Municipality's Brief at 53). "The relevancy of the report . . . was apparent." *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 946 (1st Cir. 1989); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 175 (1988) ("statements in the form of opinions or conclusions are not by that fact excluded from the scope of [Rule 803(8)(C)]."); *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 8 (1st Cir. 1990) (where the Court of Appeals indicated its willingness to interpret *Rainey* broadly).

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[11] By the comments made by the district judge from the bench during trial, even he anticipated that Defendants were going to appeal his evidentiary rulings. (Municipality's Brief at 18 (top of page)).

In *Gómez v. Rivera-Rodríguez*, 344 F.3d 103, 115 (1st Cir. 2003), the First Circuit held that the trial court's mistaken exclusion of evidence, which "was admissible to show the Mayor's understanding at the time and his ensuing state of mind," in conjunction with other errors, required a new trial. The appellate court also held that the district court erred in using Rule 403 "as an instrument for the wholesale exclusion of a percipient witness's testimony." *Id.* at 115.

Last but not least, as to the allegation that Plaintiff was not mentioned in the Comptroller's Audit Report and that the *Aldarondo-Lugo v. Municipality of Toa Baja*, 329 F. Supp. 2d 221 (D.P.R. 2004) case is distinguishable from this one, Respondent must clarify that in the *Aldarondo* case, most of the 88 Plaintiffs, whose claims were dismissed on summary judgment, had also not been mentioned by name in the Comptroller's Report.[12] It is worth noting that in the *Aldarondo* case, the judge presiding the case (Judge Pieras, the same judge as in the present case) noted that the Comptroller, who prepared the report regarding the irregularities made by the former Mayor, was named by the NPP former governor, who is of the same political party as the former mayor of the Municipality, and Plaintiff in the instant case. *Aldarondo-Lugo*, 329 F. Supp. 2d at 230. Furthermore, in *Aldarondo-Lugo*, Santiago and Delgado, in their personal capacities, were granted qualified immunity as to the First Amendment claims against

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[12] The analysis made by the Comptroller as to the illegalities in the appointment process, such as the failure to follow the merit principle in appointments, covered mainly the time period of January 1, 1996 to December 31, 1998, although some prior and subsequent operations were examined. (Municipality's Brief at 8-10).

them, excluding the harassment claims, which were not analyzed by the trial court. 329 F. Supp. 2d at 234.[13]

Likewise, in *Morales v. Santiago-Díaz*, 338 F. Supp. 2d 283, 295-296 (D.P.R. 2004), involving the same Defendants as here, another District Court Judge (Chief District Judge Fusté) made reference to the Comptroller's Audit Report and the OCALARH letter, granting Defendant's Summary Judgment motion. It is hard to understand the rationale behind the trial court's ruling in the instant case when in the above-discussed cases it not only ruled to the contrary but, in addition, relied heavily on the same documentary evidence that it excluded here.

The appellate court correctly determined that the court's attempt to be fair to all parties was not enough to render its exclusions insignificant. (Petitioner's App. A at 21a). The trial court's statements to the jury failed to put the jury on notice of the complete content of the excluded documents. (Petitioner's App. A at 21a-23a). The summaries by the trial court "were insufficient to convey the seriousness with which the Commonwealth had insisted that the defendants remedy the previous administration's abuses" (*i.e.*, illegal appointment and compensations). (Petitioner's App. A at 23a).

III. Considerations Governing Review on Certiorari

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari

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[13] *See* Petitioner's App. A at 25a-26a for the appellate court's analysis of the *Aldarondo-Lugo* case as it pertains to the present one. *See also* Santiago and Delgado's Supplemental Brief on Remand at 20-21.

will be granted only for compelling reasons." Rule 10 of the Rules of the Supreme Court of the United States. There are no compelling reasons to grant the present petition as prescribed by the Rules. *See id.* Nowhere in the petition for writ of certiorari does the petitioner affirm the character of the reasons indicated in Rule 10 of this Honorable Court. *See id.* For example, the petition fails to present this Honorable Court with a compelling conflict between decisions of the Circuit Courts or a compelling federal question of any nature. It merely adduces that the First Circuit may have erred in the application of clearly-established law. Even if Petitioner were correct in contending that the Court of Appeals applied the law incorrectly, there would be no good reason to grant her petition. But there is even less reason here because, as argued above, the Court of Appeals did not, in fact, err – to the contrary, its judgment was plainly justified.

In sum, the instant petition for writ of certiorari should be denied for the following reasons: the decision below gave full consideration to the issues and decided them correctly; the issues raised by petitioner are not sufficiently important to warrant this Court's attention because there is no circuit split and the issue raised lacks overall national importance; and the petition is void of any substantial question of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted in San Juan, Puerto Rico, this 20th day of December 2006.

SUSANA I. PEÑAGARÍCANO-BROWN
Assistant Solicitor General
Counsel of Record

SALVADOR J. ANTONETTI-STUTTS
Solicitor General of Puerto Rico

Office of the Solicitor General
DEPARTMENT OF JUSTICE
P.O. Box 9020192
San Juan, P.R. 00902-0192
Tel. (787) 724-2165
Fax (787) 724-3380
spenagaricano@justicia.gobierno.pr
Counsel for Respondents